No. 22-662

IN THE

Supreme Court of the United States

RAMON K. JUSINO,

Petitioner,

v.

FEDERATION OF CATHOLIC TEACHERS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Respondent Federation of Catholic Teachers, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

The procedural history of this case reflects the admittedly determined yet ultimately unavailing campaign of a *pro se* litigant seeking validation for his perceived injustices at the hands of his employer and his labor union. What began as a straightforward grievance arbitration to resolve whether a teacher at a Catholic high school was terminated for cause has snowballed into a misguided attempt to effectively abolish the collective bargaining rights of employees of church-operated schools. The Second Circuit Court of Appeals held that this Court's decision in *National Labor Relations Board v. Catholic Bishop*, 440 U.S. 490 (1979) compelled dismissal of the complaint of Petitioner Ramon K. Jusino ("Petitioner" or "Jusino") alleging a violation of the duty of fair representation by Respondent Federation of Catholic Teachers, Inc. ("Federation") under Federal Rule of Civil Procedure 12(b)(6). *Jusino v. Fed'n of Catholic Teachers, Inc.*, 54 F.4th 95, 107 (2d Cir. 2022). Because Jusino was a teacher at a Catholic high school, and *Catholic Bishop* precludes coverage under the National Labor Relations Act ("NLRA") of schoolteachers in church-operated schools, the Second Circuit Court of Appeals correctly concluded that Jusino failed to state a valid claim. *Id.* at 100. Because this Court grants a petition for writ of certiorari "only for compelling reasons" under Rule 10, and the petition fails to accurately present such, the Federation respectfully requests that the Court deny the petition.

STATEMENT

The Federation is a labor organization that represents teachers and other employees of Roman Catholic

elementary and high schools within the Archdiocese of New York that are members of the Association of Catholic Schools ("Association"). Petitioner's Appendix ("hereinafter Pet.App.") 7a. Jusino was a teacher at a New York Catholic school. *Id.* Through the Association, Petitioner's employer was party to a collective bargaining agreement ("CBA") with the Federation. *Id.* The CBA protects covered teachers from unjust termination and discrimination. *Id.* The CBA provides for a grievance process to resolve disputes under the contract, culminating in arbitration before a neutral arbitrator. *Id.* at 8a.

Petitioner's employer suspended and subsequently discharged him in 2018. *Id.* Jusino contacted the Federation, which filed a grievance contesting the discipline and seeking reinstatement as a remedy. *Id.* The Federation assigned Jusino an attorney to pursue the grievance to arbitration. Before the arbitration proceeding was completed, however, Jusino settled a contemporaneous discrimination lawsuit against his former employer, resolving his employment claims and therefore halting the arbitration proceeding. *Id.* at 9a.

After settling his lawsuit, Jusino filed a complaint in district court, asserting that the Federation's grievance processing was defective, allegedly breaching its duty of fair representation under the National Labor Relations Act. *Id.* at 9a-10a. Jusino also proffered state law discrimination claims against the Federation. *Id.* at 10a. Jusino alleged that the district court had subject matter jurisdiction because his Complaint raised a federal question under the NLRA. *Id.* The Federation responded by filing a motion to dismiss pursuant to Federal Rules 12(b)(1) and 12(b)(6). *Id.* The district court referred

the Federation's motion to Magistrate Judge Steven L. Tiscione. *Id.* at 29a-30a.

On March 26, 2021, Magistrate Judge Tiscione issued a Report and Recommendation ("R&R") recommending that the Federation's motion be granted. *Id.* at 40a. Magistrate Judge Tiscione observed that the Supreme Court, in *NLRB v. Catholic Bishop of Chicago*, declined to find that the NLRA gave the National Labor Relations Board ("NLRB" or "Board") jurisdiction over teachers in church-operated schools. *Id.* at 49a-50a. Magistrate Judge Tiscione relied on two cases from the Second Circuit, which interpreted *Catholic Bishop* to exclude church-operated schools' teachers from the NLRA's coverage. *See Catholic High School Ass'n of Archdiocese of N.Y. v. Culvert*, 753 F.2d 1161 (2d Cir. 1985); *Ferro v. Ass'n of Catholic Schools*, 623 F. Supp. 1161 (S.D.N.Y. 1985). In turn, Magistrate Judge Tiscione concluded that such teachers "cannot assert federal subject matter jurisdiction by bringing claims under the NLRA or LMRA." Pet. App.48a. Recognizing the prevailing caselaw's focus on whether the NLRA applied to *teachers at* church-operated schools, Magistrate Judge Tiscione found no merit to Petitioner's contention that the exclusion did not apply because his action was against the Federation rather than the school. *Id.* at 47a (emphasis in original).

Magistrate Judge Tiscione also explained that Petitioner's NLRA duty of fair representation action implicated the merits of his employer's disciplinary action, which would "likely give rise to the sort of 'difficult and sensitive [First Amendment] issues' that led the *Catholic Bishop* Court to decline to construe [the] NLRA as furnishing jurisdiction over claims by teachers at church-operated schools." *Id.* at 49a-50a.

Ultimately, Magistrate Judge Tiscione found that Petitioner, as an admitted teacher at a church-operated school, "failed to meet his burden [to] show that subject matter jurisdiction exists." *Id.* at 53a. Judge Tiscione recommended declining to exercise supplemental jurisdiction over the remaining state law claims. *Id.* at 54a. Plaintiff filed objections to the R&R on April 1, 2021. *Id.* at 30a.

On August 5, 2021, Judge Ann M. Donnelly adopted Magistrate Judge Tiscione's "thoughtful R&R" in its entirety. *Id.* Judge Donnelly reviewed the R&R *de novo* due to the purely legal nature of the jurisdictional issue. *Id.* at 34a. Judge Donnelly explained that subject matter jurisdiction over Petitioner's duty of fair representation claim was predicated on the NLRA and the amendments thereto. *Id.* Judge Donnelly concluded that *Catholic Bishop* meant that "plaintiff's former employer's status as a religious school . . . deprives the Court of jurisdiction." *Id.*

The district court rejected Jusino's reliance on the text of LMRA Section 301 for subject matter jurisdiction, explaining that the *Catholic Bishop* Court excluded parochial-school teachers from NLRA coverage based on the canon of constitutional avoidance rather than a pure textual reading of the statute. *Id.* at 35a. Like Magistrate Judge Tiscione, Judge Donnelly relied on *Culvert* and *Ferro*. *Id.* at 36a-37a. Judge Donnelly additionally relied on *Vlaskamp v. Eldridge*, which remanded an action to state court based on *Catholic Bishop*, noting:

> If we do not have jurisdiction under the NLRA over church-operated schools then we cannot

> have jurisdiction over them under the LMRA. For this reason, we follow the holding in *Ferro* and find that we do not have jurisdiction to hear this case. Pet.App.36a-37a. (quoting No. 01-cv-7348, 2001 WL 1607065, at *2 (S.D.N.Y. Dec. 17, 2001)).

Lastly, Judge Donnelly found no basis for exempting suits against labor unions from the *Catholic Bishop* precedent, agreeing with Magistrate Judge Tiscione that the caselaw focuses on the status of the teachers rather than the identity of a defendant. Pet.App.37a. The district court adopted the R&R in its entirety, granting the Federation's motion to dismiss pursuant to Rule 12(b)(1) and dismissing the Complaint's state law claims without prejudice to their repleading in state court. *Id.* The district court did not address the Federation's Rule 12(b)(6) contentions. *Id.* The district court entered judgment on August 9, 2021. *Id.* at 37a-38a.

Jusino appealed, asserting that the district court ignored the Supreme Court's decision in *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006). *Id.* at 14a. He boldly claimed that *Arbaugh* overruled the Supreme Court's decision in *Catholic Bishop* because it undermined the earlier decision's rationale, thereby expanding coverage of the NLRA to parochial school teachers like Petitioner.

The Second Circuit summarily rejected this contention, pointing out that *Arbaugh* "said nothing about *Catholic Bishop*, the canon of constitutional avoidance, the NLRA, or its applicability to labor disputes involving parochial school teachers." *Id.* at 14a. Rather, the Court agreed that dismissal of the Jusino's duty of fair representation

claim was compelled by *Catholic Bishop*, although on the grounds of Jusino's failure to state a claim under 12(b)(6) as opposed to an absence of subject matter jurisdiction under 12(b)(1). The Court clarified that *Catholic Bishop's* exclusion of parochial school teachers under the NLRA went to "'the absence of a valid . . . cause of action' on [Petitioner's] part – not an absence of 'subject matter jurisdiction' on the district court's part'" *Id.* at 20a. (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 527 U.S. 118, 128 n.4, (2014)). Regardless of this distinction, the Second Circuit affirmed the district court's dismissal of Jusino's federal claims with prejudice. Pet.App.24a.

MISCHARACTERIZATIONS IN THE PETITION

In accordance with Supreme Court Rule 15(2), the Federation points out the following mischaracterizations or inaccuracies in the petition bearing on the questions presented:

Jusino claims the Eastern District court "had supplemental jurisdiction under 28 U.S.C. § 1367 over Jusino's claims pursuant to the New York State Executive Law § 296 *et seq.*" Pet.Br.11. Petitioner *invoked* supplemental jurisdiction, but the court declined to exercise supplemental jurisdiction and dismissed the state claims "without prejudice to their repleading in a state court of appropriate jurisdiction." Pet.App.10a, 11a.

ARGUMENT

THE SECOND CIRCUIT COURT OF APPEALS CORRECTLY APPLIED *CATHOLIC BISHOP* WHEN IT DISMISSED PETITIONER'S CLAIM UNDER FEDERAL RULE 12(B)(6)

In the petition, Jusino maintains that the Federation *is* bound by the NLRA. Pet.Br.13. In addition to being virtually the only argument in the petition that has survived throughout the procedural history of this case, it continues to be categorically wrong.

In National Labor Relations Board v. Catholic Bishop, this Court rejected NLRA jurisdiction over lay teachers employed by church-operated schools. 440 U.S. 490 at 507. This determination was made based on the canon of constitutional avoidance rather than a pure textual reading of the statute. The Court considered "the legislative history of the Act to determine whether Congress contemplated that the grant of jurisdiction would include teachers in such schools." *Id.* at 504. The Court found no sufficient affirmative intent, and therefore "decline[d] to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses." *Id.* at 504-07.

Jusino argues that the Federation is bound by the NLRA "irrespective of whether it is certified by New York State or the federal government" because "the NLRA makes no mention of certification by the National Labor Relations Board . . . as a pre-requisite for coverage under the Act." Pet.Br.12-13. He argues that the Federation is

bound by the NLRA because the Act explicitly excludes certain employers and employees but makes no mention of church-operated schools. Pet.Br.12. This conclusion is the precise opposite of that which the Court reached in *Catholic Bishop*, where it found no affirmative Congressional intent to include labor unions in church-operated schools in the NLRA. *Catholic Bishop*, 440 U.S. at 506. Following this Court's reasoning, the Second Circuit found *Catholic Bishop* applicable to the instant situation and agreed with the district court that it required dismissal. Pet.App.4a; *Jusino v. Fed'n of Catholic Teachers, Inc.*, 54 F.4th 95, 98 (2d Cir. 2022).

The Second Circuit's unremarkable application of *Catholic Bishop* led it to conclude that dismissal of Petitioner's NLRA claim was required under Rule 12(b)(6). Essentially, the Federation was not certified as exclusive bargaining agent under the NLRA, a federal statute. Jusino brought his claim in federal court. The Second Circuit Court of Appeals affirmed dismissal of his federal law claim because he, as a teacher at a Catholic school, was not covered by the federal law, thus creating a defect in his pleading requiring dismissal under Federal Rule 12(b)(6).

Throughout the petition, Jusino misrepresents this holding. For example, he claims that the Second Circuit's decision "carved out a special new classification" for the Federation. Pet.Br.9. However, as Jusino well knows, unions for lay teachers in church-operated schools are recognized in New York State. The State of New York has exercised statutory jurisdiction over labor relations between parochial schools and lay teachers since the 1960s, when it amended its labor-relations laws

to explicitly cover religious employers. *Catholic High School Ass'n of Archdiocese of N.Y. v. Culvert*, 753 F.2d 1161, 1163 (2d Cir. 1985). In *Culvert*, the Second Circuit confirmed that New York State permissibly exercised this jurisdiction because it was not preempted by the NLRA under *Catholic Bishop*. *Id.*

That this case specifically involves a union's duty of fair representation as opposed to its certification—thus rendering the Second Circuit's decision "one of first impression"—does not compel a conclusion contrary to *Culvert*. *Jusino*, 54 F.4th at 98. The federal duty of fair representation is a judicially created corollary to a labor union's status of exclusive bargaining representative provided for by Section 9(a) of the NLRA. See *Vaca v. Sipes*, 386 U.S. 171 (1967). "The duty of fair representation is a 'statutory obligation' under the NLRA, requiring a labor union 'to serve the interests of all members without hostility or discrimination . . . to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.'" *Fowlkes v. Ironworkers Loc. 40*, 790 F.3d 378, 387 (2d Cir. 2015) (quoting *Vaca v. Sipes*, 386 U.S. 171, 177 (1967)). Courts review NLRA duty of fair representation claims involving an alleged breach of a labor agreement through LMRA Section 301, 29 U.S.C. § 185(a). *See Cruz v. Loc. Fed'n No. 3 of Int'l Bhd. of Elec. Workers*, 34 F.3d 1148, 1150 n.2 (2d Cir. 1994). The NLRA's duty of fair representation, however, extends only to labor unions granted exclusive bargaining status *under the NLRA*. *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 376 n.22 (1984) (emphasis added).

Petitioner claims the Second Circuit's holding in the instant matter implies that "[the Federation] can

now exist as the first certified union to have no legally enforceable duty-of-fair-representation obligation at all towards any of its members." Pet.Br.19. While the duty of fair representation *under the NLRA* may not apply to labor unions recognized under state law, in no way does the decision below stand for the assertion that bargaining units certified under state law are free to act arbitrarily, discriminatorily, or in bad faith toward their members. Petitioner demonstrated his understanding of such when he chose to sue the Federation for discrimination under New York State Human Rights Law[1] and New York City Human Rights Law[2] alongside his NLRA claim in federal

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1. New York State Human Rights Law § 296 (c) makes it illegal

> [f]or a labor organization, because of the age, race, creed, color, national origin, citizenship or immigration status, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, or status as a victim of domestic violence, of any individual, to exclude or to expel from its membership such individual or to discriminate in any way against any of its members or against any employer or any individual employed by an employer." N.Y. Exec. Law § 296 (McKinney).

2. New York City Human Rights Law Code § 8-107 1(c) makes it illegal

> [f]or a labor organization or an employee or agent thereof, because of the actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, caregiver status, sexual and reproductive health decisions, sexual orientation, uniformed service or immigration or citizenship status of any person, to exclude or to

court. Pet.App.5a. That the District Court declined to extend supplemental jurisdiction to these state law claims and dismissed them without prejudice has no bearing on labor union members' legally enforceable rights to sue their labor unions.

The Second Circuit's holding does not present the "constitutional quandary" that Jusino has attempted to craft. Pet.Br.6. Petitioner argues that the decision below "contravened the Fourteenth Amendment Equal Protection Clause by holding that – because of potential First Amendment Religion Clauses entanglements – the federal government cannot certify labor organizations that represent teachers in church-operated schools, but New York State can." Pet.Br.i. This misunderstanding of the holding ignores the well-settled legality of New York State's oversight of labor relations in parochial schools, which, as stated above, was established in 1968 and affirmed in *Culvert*. 753 F.2d at 1163.

The Second Circuit evaluated the constitutionality of the State's asserted jurisdiction over religious employers in *Culvert*: "even if the exercise of [State Labor] Board jurisdiction has an indirect and incidental effect on employment decisions in parochial schools involving religious issues, this minimal intrusion is justified by the State's compelling interest in collective bargaining." *Id.* at 1171. Thus, the constitutionality of state-certified labor unions for lay teachers in Catholic schools is well-settled

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expel from its membership such person, to represent that membership is not available when it is in fact available, or to discriminate in any way against any of its members or against any employer or any person employed by an employer. New York City, N.Y., Code § 8-107.

in New York. Jusino's perceived injustices at the hands of the Federation, then, do not "cr[y] out for this Court to exercise its supervisory judicial power and straighten out this constitutional mess." Pet.Br.11.

At bottom, Jusino's argument is that *Catholic Bishop* should altogether preclude the existence of labor unions for teachers employed by church-operated schools. Notwithstanding the fact that "it has been observed" that there should be consistency in how *Catholic Bishop* is applied to the states,[3] Petitioner's attempt to transform his original suit against the Federation into an attack on the constitutional status of labor unions in church-operated schools is awkward to say the least. It also raises questions of standing.

First, Petitioner's brief does not make clear exactly what redress he seeks from this Court, other than for it to "look into this situation to straighten out this constitutional mess" and "use its judicial power to review the substantial questions of law presented therein." Pet. Br.11, 21. In *Lujan v. Defenders of Wildlife*, this Court created a three-part test to determine whether a party has standing to sue:

> 1. The plaintiff must have suffered an "injury in fact," meaning that the injury is of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent

3. Petitioner included in his Appendix an article by Alexander MacDonald, Esq., published in the Federalist Society Review, because "[i]n Petitioner's opinion, [the] article comes across like an excellent amicus-curiae brief written specifically in support of the granting of his request for the writ of certiorari." Pet.App.60a.

> 2. There must be a causal connection between the injury and the conduct brought before the court
>
> 3. It must be likely, rather than speculative, that a favorable decision by the court will redress the injury. 504 U.S. 555 (1992).

Jusino's injury in fact is, presumably, that he was precluded from bringing his duty of fair representation claim in federal court. Jusino suggests that this Court could "allow the federal courts to implement the balancing test which the Second Circuit mandated for New York State review of disputes between unionized teachers and their Catholic school employers." Pet.Br.10. In order for this Court to issue a favorable decision that redresses Jusino's injury, then, it would have to overrule *Catholic Bishop* and allow the NLRB to certify collective bargaining units in church-operated schools. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (noting that a "remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established" (internal citations omitted)).

But the thrust of Jusino's argument is that *Catholic Bishop* should be extended, and that certification of labor unions in church-operated schools should be precluded at the state level as it is for the NLRB. Giving *Catholic Bishop* its "full force" in this way would not provide teachers in Jusino's position an avenue by which to sue their unions for the duty of fair representation. It would do exactly the opposite. Essentially, because he was unsatisfied with the representation provided by the Federation, Jusino asks this Court to redress his injury by declaring that no

similarly situated educators in church-operated schools ever be represented by a labor union again.

Petitioner also suggests that this Court should grant certiorari because Second Circuit Judge Calabresi "actually dissented somewhat" in his concurring opinion. While it is true that Judge Calabresi "expressed some significant misgivings about the Second Circuit's decision," these misgivings arose mainly from the fact that the decision, which "touch[ed] on the intersection between religious rights and freedom from discrimination," came down in the context of a lawsuit initiated by a *pro se* litigant. Pet.Br.19; *Jusino*, 54 F.4th at 107 (J. Calabresi concurring). While it is not suggested that Jusino's *pro se* status is a reason to deny the petition, neither this fact nor Judge Calabresi's lukewarm concurrence constitute a compelling reason to grant the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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